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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 507

In the Matter of

A. JOSEPH FATA, An Attorney,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MATTHEW H. BRANDENBURG,
Attorney for Petitioner,
225 Broadway,
New York, New York 10007.
COrtlandt 7-0461

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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—against—

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The petitioner above described, respectfully prays that a writ of certiorari issue in the above captioned case directed to the Court of Appeals of the State of New York to review its order of affirmance dated and entered May 20, 1965. (See Certified Copy of Record submitted herewith.)

Opinions Below

The only opinion issued in this proceeding was that of the Supreme Court of the State of New York, Appellate Division, First Department, on December 3, 1964 (Per Curiam) 22 A.D. 2nd 116.

Jurisdiction

The order of the Court of Appeals sought to be reviewed was dated and entered May 20, 1965. Therefore, the time within which this petition for writ of certiorari might be secured will expire on August 20, 1965.

The jurisdiction of this Honorable Court is invoked under United States Code, Title 28, Section 2357.

Proceedings Below

By petition verified on November 14, 1961, respondent Co-Ordinating Committee on Discipline brought a disciplinary proceeding against petitioner herein. Thereafter and pursuant to an order of the Supreme Court of the State of New York, Appellate Division, First Department, dated March 29, 1962, a Referee was appointed to take testimony and report. Hearings were held and on April 30, 1964 Hon. Sol Gelb, Referee, submitted his Report concluding that the substance of each specification of wrongful conduct on the part of petitioner was sustained by creditable evidence.

Respondent herein then moved to confirm the Referee's report. Petitioner herein cross-moved to disaffirm the Referee's report relying on constitutional questions therein specified and upon Sec. 5601(b), CIVIL PRACTICE LAW AND RULES OF THE STATE OF NEW YORK.

The per curiam opinion of the Appellate Division, First Department, dated December 3, 1964, decided that A. Joseph Fata should be disbarred.

Thereafter petitioner moved for leave to appeal to the Court of Appeals from the said order of disbarment and

by order dated March 9, 1965 mailed and received from respondent on May 16, 1965, the application was denied. Thereafter, petitioner made application for leave to appeal to the Court of Appeals. The Court of Appeals heard said application on the constitutional issues and affirmed the order of the Appellate Division below, without opinion. (May 20, 1965.)

Questions Presented

1. Was A. Joseph Fata denied his State and Federal Constitutional Rights of due process, a fair trial, fair hearing and fair and individualized adjudication of his personal and individual responsibility or guilt of the disciplinary charges, in view of the indications in the Appellate Division per curiam opinion of December 3, 1964?

2. Was there illegal and improper use of petitioner's photograph clipped from a newspaper during the course of respondent's investigation an act depriving petitioner of his Federal Constitutional safeguards and Rights of Due Process?

2a. Was it illegal or improper for the Co-ordinating Committee to fail to exhibit photographs of petitioner's associates, in addition to his own at the time they exhibited a picture of petitioner to these clients?

3. Was the procedure used by the Co-ordinating Committee of the hearings and adjudication of the disciplinary proceedings defective as a matter of due process of law, State and Federal, in that A. Joseph Fata had been tried, adjudicated and disciplined on the basis of charges and proofs relating to alleged misconduct of other persons and attorneys?

4. Was it error on the present record to determine that the requisite legal intent of a "partnership" between A. Joseph Fata and his brother, Francis A. Fata was established within such legal meaning and such legal purposes as to justify the invoking of such alleged "partnership" status in regard to the above mentioned ruling or was it a determination based upon which it may be termed an unconstitutional doctrine of imputed scienter?

Constitutional Provisions Involved

The provision of the Constitution of the United States involved herein is the Fourteenth Amendment, the pertinent section of which is as follows:

> "Section I. * * * Nor shall any state deprive any person of life, liberty or property, without due process of law; or deny to any person within the jurisdiction the equal protection of the law."

Statement

The Referee held that all the charges have been sustained. The charges are as follows:

1. Setting up of Zaccardo as a tow-trucker to solicit personal injury cases.

2. Solicitation of cases for the "Fata brothers."

3. False information on statements of retainer as to the referrals of claims.

4. Submitting false medical bills.

5. Building up an exaggeration of claims submitted to insurance carriers.

6. Submitting false bills of particulars.

7. Submitting false statements of loss of earnings; 8, 9 and 10: having clients sign blank retainers, failing to secure Court orders in infant compromise cases and failure to maintain a special bank account and/or failing to serve clients with closing statements.

With respect to charges 8, 9 and 10, it was conceded by petitioner that he failed to do that which the law required and admitted his responsibility as to these items. These were considered by the Appellate Division and the Court of Appeals to be lesser offenses.

In an opinion of the Apellate Division and confirming the Referee's report, it appears that the Appellate Division devoted particular attention to Charges 1, 2 and 3 which are inter-related, concerned with solicitation and concealment thereof. The Appellate Division even more pronouncedly than the Referee appears to have viewed these 3 charges as having been sustained on the basis of imputing to A. Joseph Fata a presumptive scienter arising from the sole circumstance of association in the law practice with his brother, Francis A. Fata, and with one John F. Andreuzzi.

The Appellate Division also approved the Referee's conclusion that the petitioner's association in law practice with his brother was a "partnership" rather than as petitioner claims a "loose and more informal type of association." Substantial evidence was presented on behalf of petitioner at the Referee's hearing on this question and yet neither the Referee nor the Appellate Division referred to this evidence. The evidence as presented on behalf of respondent indicates that the legal intention of a "partnership" was

not shown upon the present record. If such intention was not shown in sufficient degree to justify importing into the case the forensic doctrine of imputed partnership scienter, for purposes of disciplining an attorney to the destructive extent of an order of disbarment, and an important question of law is believed to be presented for this Court's consideration. In support of this application the previous decisions in this State cited and relied upon by the Appellate Division as justifying such a far-reaching imputational partnership scienter—viz., *Matter of Gladstone,* 16 A.D. 2d 512, leave to appeal denied 12 N.Y. 2d 644; *Matter of Shields,* 16 A.D. 2d 50, leave to appeal denied 11 N.Y. 2d 648; *Matter of Weitz,* 11 A.D. 2d 76, affirmed 9 N.Y. 2d 735—involved facts of undisputed actual partnership status; they also involved other facts which render the present case strongly distinguishable, including the facts that the undisputed partnership in those cases were of lengthy duration, among attorneys of mature age and experience, and negligence case office "dockets" running into the thousands of cases. In connection with this it was not previously mentioned that the present "Fata and Fata" case has involved, during the period of time pertinent herein, a maximum of 316 cases on the "Fata and Fata" office docket of which 261 cases reached the stage of retainers, and of which latter 41 had to be dropped and 12 others were settled without fee. Reference is to be made to the retainers in the following manner: It was stipulated that there were 261 statements of retainers involving 339 clients (page 88, preliminary hearing). Between the periods of March 4, 1955 to April 16, 1959, petitioners were to be furnished with a list of these retainers in order to be verified. However, this list was never furnished although

duly demanded from respondents until after the hearings were concluded and the referee's report was rendered.

It develops that the facts stipulated to were incorrect.

First, the number of retainers referred to go beyond March 9, 1959, since petitioner withdrew from the association with his brother as of March 9, 1959, and was therefore not responsible for any retainers acquired by Francis A. Fata or John F. Andreuzzi subsequent to March 9, 1959. This would, therefore, reduce the number of retainers by at least ten cases. A further breakdown would show that of the 251 remaining retainers, A. Joseph Fata withdrew as counsel in 12 of said cases and was withdrawn as the attorney in approximately seven other cases and, in addition thereto, the clients themselves abandoned approximately 41 of their cases. The retainers were not available for examination by petitioner throughout the hearings, although they were in the possession of the Coordinating Committee and its staff until May, 1964, at which time they were returned to the offices of the Appellate Division, First Department. This information was omitted from the record and should have been made part of it.

Charge No. 1—Setting up of Zaccardo, the tow-trucker, to solicit personal injury cases: In essence, Zaccardo, before the Referee (S.M. 175-846) was pretty completely exonerative of A. Joseph Fata personally as distinct from the acts of his brother, Francis A. Fata.* The referee's report on this subject (page 2), notes that A. Joseph Fata** was present apparently in a passive way when meeting with Zaccardo in the fall of 1955 where a personal injury case was given to the Fata brothers. Another meeting took place

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* Also known as Frank Fata.

** Also known as Joseph Fata.

some months later when Frank Fata and Zaccardo discussed Zaccardo's acquisition of a tow-truck business. The only other incidents mentioned by the Referee as involving Joseph in connection with Zaccardo were that Joseph told the radio dealer to give Zaccardo the credit recommendation for purchase of a police radio for Zaccardo's tow-truck, and that at Christmas of 1956, Zaccardo needed extra money and went to the office of Fata brothers where he was given money in the presence of Joseph. The Referee referred also to Joseph's denial of knowledge of any impropriety in connection with Zaccardo. The Referee cited, however, testimony by Joseph on a previous occasion which pointed out that Joseph having either himself or with his brother made several loans to Zaccardo after Joseph knew that Zaccardo was referring cases to their office. This testimony refers to hearings conducted by the New York City Department of Investigation when petitioner was employed as counsel to the Licensing Division of the City of New York. It developed that during the course of his employment some suspicion was cast upon petitioner for having granted licenses to certain tow-car operators which was showing favoritism because of their association with petitioner. Petitioner was never advised of his constitutional rights nor was he advised of his right to refuse to answer questions or advised to secure an attorney to represent his interests. He was taken before the Commissioner of Investigation, interrogated, and it was from these various minutes that the questions and answers used by respondent in cross-examining petitioner that they referred to his testimony which it is respectfully submitted was illegally and improperly taken in the first instance. It is clear from the Referee's conclusion in re-

gard to Charge No. 1 and likewise in regard to Zaccardo's items of soliciting under Charge No. 2 was decisively influenced by considerations of imputational guilt, guilty scienter, was not founded upon distinct proof of the respondent's actual known guilt, together with the use of his testimony before the New York City Department of Investigation.

The Referee's conclusion in regard to Charge No. 1—and likewise in regard to the Zaccardo items of soliciting under Charge No. 2—was decisively influenced by considerations of imputational guilty scienter and was not founded distinctly upon proof of the respondent's actual knowing guilt, is shown by the following which appears in the Referee's report (p. 7):

> "The position taken by the Respondent is not that Zaccardo did not solicit cases for Fata & Fata; not that Zaccardo wasn't hired for that purpose by Fata & Fata, but that he, the Respondent, had nothing to do with it and knew nothing about it. That position is certainly difficult to sustain in the face of the objective facts. The Respondent and his brother Frank Fata, were engaged in the practice of law under the name of Fata & Fata. The relationship was established by Michael Zaccardo presumably with Frank Fata. Respondent certainly knew of some aspects of the relationship, namely, the loans made to Zaccardo who to the Respondent's knowledge, was unemployed; the referral of cases by Zaccardo to the office of Fata & Fata; the practice of Zaccardo putting a touch on the Respondent who would then loan him some money. Above all, it is hardly likely that Zaccardo could have operated as a runner for Frank Fata for more than a year and a half without the Respondent learning something about that op-

> eration from his brother. The Respondent would have us believe that he so insulated himself that none of his brother's improper activities became known to him."

Even more pronouncedly in this same vein of imputational guilty scienter, the Appellate Division in its per curiam opinion herein reasoned the case exclusively in terms of the respondent's vicarious or imputed responsibility, i.e., the Appellate Division announced no conclusion or finding of its own that the respondent had actual knowledgeful personal guilt—although it did of course refer to the Referee's rejection of respondent's credibility in denying the charges, and it did also conclusorily confirm the report of the Referee (apparently in its entirety). See the copy of the per curiam opinion of the Appellate Division.

As to Charge No. 2—Solicitation of eleven cases for the Fata brothers:—This included three solicitations by Zaccardo, as to which please see my last preceding numbered paragraph herein. The Referee's discussion of Charge No. 2 was rather brief (pp. 8-9 of the Report). In essence, the Referee's conclusion was that these solicitations were for "the firm of Fata & Fata", and that Joseph Fata's denials of knowledge thereof were not credible. In this respect the situation is closely similar to that under Charge No. 1, *supra*, where, as seen, the case against petitioner turned decisively upon the theories of imputed and vicarious responsibility. It is unfortunate that the Referee did not see fit to discuss in more detail the evidence relating to Charge No. 2. For example, one of the cases of solicitation under Charge No. 2 involved a claim by Leonard Helles, solicited by Zaccardo. The Referee concluded that this case

was solicited for "the firm of Fata & Fata" but Zaccardo himself testified that he recommended Francis A. Fata for this case (S.M. 767-768). Similarly, another accident claimant under Charge No. 2, Alfred Cirulli, testified that Zaccardo got him the lawyer, who evidently was "Frank Fata" and that he only met Joseph Fata at the time of settlement of the case (S.M. 166-168). The picture is similar with respect to Zaccardo's solicitation of the accident claimant John Montigue (under Charge No. 2); see S.M. 1308-1310. Especially interesting is the evidence relating to the alleged solicitation of Lacy Bristow (under Charge No. 2). Bristow at first said, in the Referee hearing, that he had been introduced and referred to Joseph Fata at an automobile repair shop, but when asked whether it was not Frank Fata instead, he said that he was "not that good at remembering faces" (S.M. 46)—the incident involved had occurred five years previously—and he had told the Co-ordinating Committee concerning the two brothers that "if I see them both face-to-face, they look alike. They look like twins to me" (S.M. 51). This very close twin-like resemblance between the two Fata brothers is a theme that recurs throughout the case. Similarly the accident claimant Joseph Tannenbaum (under Charge No. 2) could not tell which of the Fata brothers he had been referred to (S.M. 286-287, 329, 332). Also another accident claimant, Curtis Harris, testified that he was solicited by a "Mr. Fata" but that he saw the respondent Joseph Fata for the first time later at the Fata brothers' law office (S.M. 485-493). Again, Edna McAllister, the mother of an infant claimant, had testified before the Co-ordinating Committee and testified in the Referee hearing in a manner showing uncertainty and confusion as to whether she had been solicited by Francis or Joseph

Fata (S.M. 674-680, 691-700). See the similar situation in connection with the accident claimant Cora Russell (S.M. 543-544, 576). Likewise in the case of Mary Searles, the lawyer hired was a "Mr. Fata" (S.M. 70). "Mr. Fata" was also the lawyer hired by claimant Arthur Logan, who was not sure which of the brothers it was (S.M. 594-595). In the case of Lindsey Williams, someone at the accident scene gave him a business card of Fata & Fata, but Williams said that he had known these lawyers before the accident and hired them on his own (S.M. 262, 275-278). It is to be remembered that the only photograph used to help the witnesses determine with whom they dealt was the photograph of A. Joseph Fata. No other person's photograph was used, and yet none of the witnesses was certain it was that of the respondent with whom they dealt as distinguished from respondent's brother or his other associate, John F. Andreuzzi. It is also to be remembered that the Coordinating Committee interrogated witnesses (clients) during the years 1960, 1961 and 1962, and that said witnesses (clients) in many instances, had no contact with the petitioner, Francis A. Fata and/or Joseph F. Andreuzzi for several years prior thereto, yet when they were so interrogated, a picture of the respondent, A. Joseph Fata, was shown to them which picture had been displayed and portrayed prominently and on numerous occasions in the various local newspapers and television media.

In nearly all if not all of the above mentioned cases under Charge No. 2 the signed retainer agreements were in the handwriting of Francis, not Joseph Fata. The Appellate Division's only observation concerning the proofs

under Charge No. 2 was that "under Charge No. 2 it was established that there was solicitation by others for the firm". (See opinion of Appellate Division dated December 3, 1964).

A photograph was used by the respondent throughout the hearings for the purpose of confronting the various witnesses to identify the petitioner as the one with whom they dealt. The witness was thus oriented to identify petitioner as the only person with whom they dealt. It is to be remembered that petitioner and his brother looked like twin brothers and respondent did not reveal the picture of his brother, when in truth and in fact the Co-ordinating Committee was aware that petitioner was not the only person associated with his brother, Francis A. Fata, and was not the individual with whom most of the clients came in contact with in the first instance. (This use of petitioner's picture deprived the witnesses of the opportunity of identifying petitioner's brother until the actual hearings occurred before the Official Referee. The record indicates that the witnesses previously interviewed by the Co-ordinating Committee had then admitted their interviewed confusion by indicating that they referred to the "twins". Respondent looks so much like his brother that they didn't remember which Mr. Fata they dealt with, and that in almost every instance, the witness indicated they were not able to be positive of identification as to whethey they dealt with petitioner or his brother. There is not one single "clear and convincing" instance in this record of the young and inexperienced Joseph Fata's having had actual scienter of the solicitation of any client. In case after case where Joseph Fata stands branded by the tribunals below as having had such scienter, it turns out that it either definitely was or

altogether believably could have been his brother Frank, not Joseph, who knowingly committed the charged impropriety; witness after witness confused the two brothers owing to their twin-like family resemblance, or knew only that their original contact had been with a "Mr. Fata", etc. The solicitation phase of the case, as seen, was evidently regarded by the Appellate Division as the decisionally operative phase, nothing else in the case being mentioned in the Appellate Division's opinion except by way of a mere listing of charges. It therefore seems entirely reasonable to conclude that Joseph Fata has been condemned on the solicitation charges, not on any positive proof of his own knowledgefully guilty conduct, but on the basis of a combination of an imputational "partnership" scienter doctrine and a congeries of witnesses who indisputably could very well have been making mistakes as to the respective identities of the two Fata brothers.

As to Charge No. 3—False information on statements of retainer as to referrers of claims:—The Referee concluded that the evidence clearly sustained the charge, particularly with respect to seven cases, but the only specific testimony which the Referee discussed under this Charge No. 3 was that relating to Lacy Bristow (Referee's report, pp. 9-10). As above noted, the proof of the Bristow solicitation charge was seriously weakened by Bristow's admission that the two Fata brothers looked like twins to him. It is in the light of this last that one must evaluate the further proof that petitioner put his father's name in the retainer agreement as the referrer in the Bristow case. The petitioner's explanation of this was that his brother Francis had told him that Bristow had been referred by a customer of a bar owned by their father. The Referee found

the petitioner's testimony as to this "not credible" but it is hard to avoid the conclusion that the theme of imputation of guilt was at work here, because petitioner's testimony becomes entirely credible once it is acknowledged that Bristow could easily have mistaken Frank for Joseph, so that Joseph's subsequent information obtained from Frank could have been believed by Joseph in good faith. This Lacy Bristow item under Charge No. 3 insistently presses itself upon one's mind as being one more instance of the learned Referee's seemingly having become over-imbued with the "vicariously liability" approach to the case. The Appellate Division's only observation in its per curiam opinion concerning Charge No. 3 does not go to the question of whether the charge was sustained at all against petitioner, but consists merely of the following: "The giving of false information as to the referrer of the client as alleged and proven under Charge No. 3, tends to establish an attempt to conceal the wrongful solicitation". This obviously leaves open the crucial questions of whether Joseph Fata was the one who perpetrated such concealments or of whether he had guilty knowledge thereof.

As to Charge No. 4—False medical bills:—On the seven cases involved under this charge the Referee merely announced his conclusion that the evidence "clearly supports the charge", and the entire remainder of the Referee's report on this charge consists merely of the following:

> "There is no question as to the sufficiency of proof establishing that medical bills were false and medical reports were false. There is no question but that these false bills and false reports were submitted to the insurance carriers. The Respondent in effect took the position that he had nothing to do with it and

> that he knew nothing about it. This position is incredible. To accept it would be to stretch the long arm of coincidence too far. I therefore reject it. The charge has been sustained." (Report, p. 10—Exhibit "B" hereto).

It will be noted that the Referee adduces no *proof* that petitioner did have guilty scienter concerning these false medical bills and reports, but concludes rather that the petitioner's sworn claims of lack of any such guilty scienter taxes "coincidence too far". In all earnest respectfulness, what we have here is an out-and-out invoking by the Referee of the above mentioned doctrine of imputed scienter in its most unmistakable form. Let us briefly examine the specific cases under Charge No. 4. Accident claimant Mary Searles, who undisputedly suffered some accident injury, testified variously but repeatedly along the lines of the familiar inability of the various witnesses in this case to say positively which of the two Fata brothers they dealt with (S.M. 66-92). Edna McAllister's testimony was entirely consistent with Joseph Fata's having no guilty participation in any false medical bills or reports concerning her infant son, and before the Court which approved the compromise she showed thorough familiarity with the medical items claimed (S.M. 660-715). Lacy Bristow's case is similar as regards failure of proof of respondent's guilty scienter (S.M. 2 et seq.). Cora Russell, mother of the infant claimant Michael Russell, is a case closely similar of that of Edna McAllister, *supra* (S.M. 540 et seq.). Curtis Harris was simply a case where respondent used a doctor's report which he found in the file and upon whose truthfulness he depended (S.M. 1106 et seq.). Joseph Tannenbaum is a situation very similar to the Harris case just mentioned. The case of the infant Edward Jackson is similar to the above cases of the Mc-

Allister and Russel infants. It can scarcely be without significance that the Appellate Division in its per curiam opinion did not discuss Charge No. 4 at all except to refer to it as being one of the charges in the case.

As to Charge No. 5—Building up and exaggerating claims:—The Referee's report on this charge may be read in vain for any slightest indication that the Referee found anything in the record to establish Joseph Fata's actual personal guilty scienter. This portion of the Referee's report appears (pp. 11-12). Of the nine cases involved, the Referee discussed the evidence in only one, the case of Lacy Bristow. It is true that the petitioner prepared a fact sheet on the Bristow claim noting that Bristow was unemployed at the time of the accident, and it is also true that petitioner prepared the letter of transmittal to the insurance company for the document claiming loss of earnings (which admittedly was false). But petitioner's testimony was that he had no distinct recollection of seeing the false earnings document, and that either his brother or their office associate Andreuzzi asked him to send the document to the insurance company. On this record it is very difficult to understand the Referee's comment that this testimony of petitioner "is a glaring example of the respondent's pleading no knowledge in the face of irrefutable fact" (Report, p. 12). Once again, it is hard to avoid the conclusion that Joseph Fata is the victim of the peculiar doctrine of imputed scienter which has played so pervasive a part throughout this case. And once again also, it can scarcely be without significance that the Appellate Division in its per curiam opinion herein made no reference to Charge No. 5 except to list it as one of the charges in the case.

As to Charge No. 6—False bills of particulars:—This involved only one case, Fulton Wilson. The Referee did not tax petitioner with any guilty scienter, even by imputation, under this Charge but concluded merely that the bill of particulars was false (Referee's Report pp. 12-13). The Appellate Division in its per curiam opinion merely listed this as one of the charges, without commenting thereon.

As to Charge No. 7—False statements of loss of earnings:—Here again the Referee does not say anything about the petitioner's scienter, imputed or otherwise (Referee's Report, p. 13); and the Appellate Division merely lists this charge as one of the charges in the case.

As to Charges No. 8, 9, 10—Blank retainers, infant's compromises, special bank account, clients, copies of closing statements:—These lesser charges, which were undisputed or largely so, are discussed in the Referee's Report (pp. 13-14). The Appellate Division listed them but did not discuss them.

From the foregoing it is seen that the Appellate Division, in confirming the Referee's report, appears to have devoted particularized attention only to Charges No. 1, 2 and 3, which are inter-relatedly concerned with solicitation and concealment thereof. As noted, the Appellate Division, even more pronouncedly than the Referee, appears to have viewed these three charges as having been sustained on the basis of imputing to Joseph Fata a presumptive scienter arising from the mere circumstances of his assoication in law practice with his brother Francis Fata and with John F. Andreuzzi.

The Appellate Division also approved the Referee's conclusion that petitioner's association in law practice with his brother was a "partnership" rather than as petitioner claimed a looser and more informal type of association. The Referee's remarks on this subject, which we have not previously herein referred to, appear in his Report (pp. 7-8). Substantial evidence was introduced by petitioner in the Referee's hearing on this question, and that neither the Referee nor the Appellate Division referred to this evidence. If, as we contend, the legal indicia of a "partnership" were not shown upon the present record—at least if such indicia were not shown in a sufficient degree to justify importing into the case the drastic doctrine of imputed "partnership" scienter for purposes of disciplining an attorney to the destructive extent of an order of disbarment—an important question of law is believed to be presented for this Court's consideration. It is urged that the previous decisions in this State cited and relied upon by the Appellate Division justify such a far-reaching imputational partnership scienter—*viz., Matter of Gladstone,* 16 A.D. 2d 512, leave to appeal denied 12 N.Y. 2d 644; *Matter of Shields,* 16 A.D. 2d 50, leave to appeal denied 11 N.Y. 2d 648; *Matter of Weitz,* 11 A.D. 2d 76, affirmed 8 N.Y. 2d 735—involved facts of undisputed actual partnership status; they also involved other facts which render the present case strongly distinguishable, including the facts that the undisputed partnership in those cases were of lengthy duration, among attorneys of mature age and experience, and negligence case office "dockets" running into the thousands of cases. It was not previously herein mentioned that the present "Fata & Fata" case had involved, during the period of time pertinent hereto,

a maximum of 316 cases on the "Fata & Fata" office docket about a period of four years of which 261 cases reached the stage of retainers, and of which latter 41 had to be dropped and 12 others were settled without fee. Reference is to be made to the retainers in the following manner: It was stipulated that there were 261 statements of retainers involving 339 clients (page 88, preliminary hearing), between the periods of March 4, 1955 to April 16, 1959 (about a period of more than four years). Respondents were to be furnished with a list of these retainers in order to be verified. However, this list was never furnished although duly demanded from petitioners until after the hearings were concluded and the referee's report was rendered. It develops that the facts stipulated to were incorrect. *First,* the number of retainers referred to go beyond March 9, 1959, since respondent withdrew from the association with his brother as of March 9, 1959, and was therefore not responsible for any retainers acquired by Francis A. Fata or John F. Andreuzzi subsequent to March 9, 1959. This would, therefore, reduce the number of retainers by at least ten cases. A further breakdown would show that of the 251 remaining retainers, A. Joseph Fata withdraw as counsel in 12 of said cases and was withdrawn as the attorney in approximately seven other cases, and, in addition thereto, the clients themselves abandoned approximately 41 of their cases. The retainers were not available for examination by respondent throughout the hearings although they were in the possession of the Coordinating Committee and its staff until May, 1964, at which time they were returned to the offices of the Appellate Division, First Department. This information was omitted from the record and should have been made part of it.

In connection with the previous averments herein concerning the injustice and violation of constitutional right in subjecting A. Joseph Fata to a disciplinary proceeding that has been so indispensably based upon a theory of imputational and vicarious responsibility and which has now resulted in the termination of the career of this young attorney of prior unblemished record and reputation. It is necessary to call attention to the following facet of the situation which intensifies the legal and constitutional aggrievement in these regards:—As earlier herein recited, this disciplinary proceeding was originally instituted against both of the Fata brothers together and it was continued against Joseph Fata alone when his brother resigned from the Bar. Throughout these proceedings it was urged (unavailingly) on behalf of Joseph Fata that he could not possibly obtain a fair judicial determination of the distinct issues of his own individualized guilt or innocence when his own case was being coupled with the case of his brother. True, after his brother Frank resigned from the Bar (which was prior to the Referee hearing herein), the case proceeded against Joseph alone. But by that time Joseph's case was inextricably interwoven with the case of his brother Francis, and the peculiar circumstance of the remarkable (twin-like) physical resemblance between the two brothers all but inevitably portended that Joseph was going to have to "stand trial" for acts which if done were done by another person. The situation was rendered totally hopeless for Joseph's chances by the invoking of the theory of imputational scienter plus vicarious responsibility that has brought about, as we now see, the destruction of his career as a lawyer. It respectfully seems to petitioner, that the peculiarly anguishing

way in which the termination of a young lawyer's career has been encompassed in this very unusual case cries out for judicial corrective at the hands of this High Tribunal.

Much closer on its facts to our situation is *Matter of Kiley,* 22 A.D. 2d 527 (1st Dept., decided March 4, 1965), where the Court found mitigating circumstances in the case of a young attorney who had become a partner of his older brother and who was inexperienced in negligence practice. The Referee found that the respondent's conduct in the matters charged "was that of passive nonfeasance rather than active and knowing wrongdoing". The Court, while stating that the partnership responsibility should be enforced against the respondent within the meaning of the *Gladstone* case, *supra,* acted mitigatingly to suspend the respondent for two years instead of disbarring him.

Petitioner respectfully calls attention also to the well-known case of *Matter of Neimark,* 13 A.D. 2d 676, 214 N.Y.S. 2d 12 (2nd Dept. 1961), where the Court found extenuation in that the respondent's misrepresentation of facts to an insurance company resulted from false information given by clients, carelessness of office subordinates in verifying the false information, and respondent's own careless reliance on the clients and on his subordinates; the respondent was censured.

It is believed that no extended argument is needed in support of the contention that it would be a denial of due process of law, both State and Federal, to apply in an indiscriminate or sweepingly doctrinare manner a principle of imputed partnership scienter in any and all disciplinary proceedings against lawyers who are in a law partnership. Surely, some sensible standard of selectivity is called for

in applying such a doctrine of imputed partnership scienter. Although the instant case does not properly call for applying such doctrine; surely it does not justify applying that same doctrine to this petition before this Court.

The rule of cases like the *Gladstone* case, *supra,* must be kept within proper bounds. A case like the present one of Joseph Fata arouses fear that the *Gladstone* rule may become a fetish which can imperil innocent attorneys. The *Kiley* case, *supra,* suggests that the Appellate Division, First Department, where the *Gladstone* rule appears to have originated, may itself not be entirely at ease in administering that rule, for the Court in the *Kiley* case found a way of alleviating the rigors of the *Gladstone* rule. We think the Court below erred in not doing likewise in our case.

The Court should reach out its hand to re-evaluate the more sweeping extensions of the *Gladstone* rule which appeared to be implicit in a decision such as the one here sought to be reviewed.

Reasons for Allowance of the Writ

The fair meaning of the cases in this State on the question of burden of proof in disciplinary proceedings against attorneys is, we submit, that the burden is one lying intermediately between the burden applied in a civil forum and that applied in a criminal forum. Although the rules of presumption of innocence and proof of guilt beyond a reasonable doubt are not applicable here, the decisions reveal that the rule requiring proof of the charges of misconduct by a preponderance of evidence is applied in a

distinctively exacting manner, reflecting the solicitude with which Anglo-American jurisdictions have traditionally regarded the right of a licensed attorney or counsellor to pursue his profession in a proper manner, and the recognized need of protecting attorneys and counsellors against ill-considered or intemperate official charges. Examples of cases where the courts have applied the rule of burden of proof in the exacting manner above noted, are: *Matter of Turchin*, 10 N.Y. 2d 959 ("evidence does not warrant the conclusion that there was intentional misconduct");* *In re Goldstein*, 265 App. Div. 935 (2nd Dept. 1942) ("the inferences of no *intentional* wrong clearly outweigh any other inference"); *In re Cook*, 242 App. Div. 224 (1st Dept. 1934) (record "does not *clearly* indicate" guilt of professional misconduct); *In re Lynch*, 227 App. Div. 477 (1st Dept. 1930) ("no *satisfactory* evidence" of violation of law or the code of ethics; weight given to respondent's favorable reputation; "despite their [petitioners'] meticulous and searching examination * * * these efforts have remained barren of results").

The emphasis in the above cases on the issue of the "intentional" character of an attorney's conduct, and on the need for "clear" or "satisfactory" evidence, bespeaks, as we suggested, the prevalence, in disciplinary proceedings, of a distinctive requirement of judicial proof that is in a significant degree more exacting than the conventional standard of "preponderance" applied generally in civil cases.

It is not expected that this Court shall take our application for the purpose of reviewing the weight of the evidence.

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* In the *Turchin* case the Court of Appeals by memorandum decision reversed the unanimous memorandum decision of the Appellate Division (12 A.D. 2d 650—2nd Dept.).

Our emphasis upon the evidence, and upon the canons by which it should properly be weighed, is in the hope that this Court may agree with us that the condition of the evidence in this record when viewed in juxtaposition, so to say, with the pervasive reliance of the Referee and the Appellate Division on imputed scienter rather than an actual scienter actually proved, justifies the granting of our application to review the overall impact of the imputation doctrine in this case, and, as well, to re-assess the soundness of that doctrine as a matter of justice and constitutional due process.

In *Cohen* v. *Hurley*, 366 U.S. 172, the Court stated: "We do not hold that the lawyers, because of their special status in society can therefore be deprived of constitutional rights assured to others * * *".

Mr. Justice Black in his dissenting opinion further stated:

> "Even apart from the financial impact, the disbarment of the lawyer cannot help but have a tremendous effect on the lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. Such dishonor undoubtedly goes far toward destroying the reputation of the man upon whom it is heaped in the community in which he lives. The suffering that results falls not only upon the disbarred lawyer, but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the 'law of the land', but constitutional and statutory. In view of all this, I can see no justification for the motion that membership in the bar is a mere privilege conferred by the state and is therefore subject to withdrawal for the 'breach' of whatever vague and indefinite 'duties' the courts

and other lawyers may see fit to impose on a case by case basis. * * * Petitioner is entitled to every presumption of innocence until and unless such a violation has been charged and proved in a proceeding in which he, like other citizens, is accorded the protection of all of the safeguards guaranteed by the requirements of equal protection and due process of law. This belief that lawyers, too, are entitled to due process and equal protection of the laws will not, I hope, be regarded as too new or too novel."

CONCLUSION

It is respectfully submitted that sound reason exists for this Court noting jurisdiction and granting the writ sought.

Respectfully submitted,

MATTHEW H. BRANDENBURG
Attorney for Petitioner

APPENDIX A

Order Denying Motion for Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twentieth day of May A. D. 1965.

Present:

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

Mo. No. 436

In the Matter of

A. JOSEPH FATA (Admitted as Angelo J. Fata), an Attorney,

Appellant,

THE CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A Copy

GEARON KIMBALL
Deputy Clerk